

STATE OF MICHIGAN

IN THE SUPREME COURT

CITIZENS INSURANCE COMPANY,

Plaintiff/Counter Defendant-  
Appellee, *et al*

v

PRO SEAL SERVICE GROUP INC., d/b/a PRO  
SEAL INC.,

Defendant/Counter Plaintiff-  
Appellant, *et al*

and

SETH SHORT, RANDY QUINCY, FLOWSERVE corporation,  
CORPORATION, and FLOWSERVE, a  
MANAGEMENT COMPANY,

Defendants.

Defendants,

and

PROSEAL SERVICE GROUP, INC.,  
d/b/a PRO-SEAL, INC., a Michigan  
corporation,

Counter-Plaintiff,

v

CITIZENS INSURANCE COMPANY,

Counter-Defendant.

S.C. No. \_\_\_\_\_

COA No. 262759

*op 11/1/05*

L.C. No. 04-056953-CZ

*Oakland*

*E. Losnick*

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Defendant/Appellee.

and

FLOWERVE CORPORATION, a New York corporation,  
FLOWERVE MANAGEMENT COMPANY, a  
Delaware corporation, SETH SHORT and  
RANDY QUINCY,

Defendants,

and

**APPLICATION FOR LEAVE TO APPEAL**

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**STATEMENT CONCERNING COMPLAINED-OF OPINION AND SETTING FORTH  
REQUESTED RELIEF**

Pursuant to MCR 7.302, defendant/counter defendant-appellant Citizens Insurance Company of America (hereinafter “Citizens”) seeks this Court’s review of the Michigan Court of Appeals’ November 1, 2005, opinion. A copy of the opinion is submitted as Exhibit A.

The Court of Appeals opinion is the first and, thus far, only published opinion by a Michigan appellate court on the frequently litigated issue of whether a trademark infringement claim is potentially covered under the advertising injury provisions of a standard commercial general liability policy. The Court of Appeals held that a trademark infringement claim is covered as “Personal and advertising injury” under the definition “Infringing upon another’s copyright, trade dress or slogan in your ‘advertisement.’” The Court of Appeals reasoned, first, that because the protection of both trademarks and trade dress serves the same statutory purpose of preventing deception and unfair competition, an allegation of trademark infringement *encompasses* a trade dress violation. The Court of Appeals also opined that the complaint against Citizens’ insured actually did assert a claim of trade dress infringement, by virtue of allegations that Citizens’ insured affixed the underlying plaintiff’s trademark to its products and to a crate in which they were shipped, despite the fact that the 32-page underlying complaint itself did not characterize those factual allegations (or any others) as trade dress violations—and rightly so, since they are not.

The Court of Appeals cited no authority in support of its conclusion that the trademark infringement allegations in the underlying complaint should be deemed to be—and, in fact, are—allegations of *trade dress* infringement, and Citizens is aware of none that would support it. To the contrary, at least three other courts have addressed that very issue and have reached the

opposite result: trademark infringement is distinct from trade dress infringement, and the potential coverage of the latter does not translate into coverage of the former.

Second, the Court of Appeals found that the supposed trade dress infringement occurred in the insured's "advertisement"—by concluding that *all* trade dress infringement involves advertisement by definition. In so holding, the Court of Appeals effectively read the "in your 'advertisement'" portion out of the phrase "Infringing upon another's . . . trade dress . . . in your 'advertisement.'" The Court of Appeals cited no authority in support of this conclusion other than a district court opinion from the Eastern District of Michigan, the pertinent analysis from which was based on different language (the undefined phrase "course of advertising" as opposed to the term "advertisement," which is defined in the Citizens policy)—and has been rejected by the Sixth Circuit even in that different context. By concluding that trademark infringement claims encompass trade dress infringement by definition, which necessarily involves advertising, the Court of Appeals has also effectively nullified the longstanding requirement of a causal connection between injury and advertising in this context. Under the Court of Appeals' reasoning, the causal connection between damages for trademark infringement and the defendant's advertising will always be satisfied because all trademark infringement is trade dress infringement and advertising by definition.

Finally, the Court of Appeals reversed the trial court's conclusion that coverage, if any, was excluded in any event by virtue of an exclusion for "Personal and advertising injury" "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'Personal and advertising injury.'" Despite the fact that the underlying complaint alleged only intentional misconduct on the part of Citizens' insured—no inadvertent or negligent conduct was alleged—the Court of Appeals reasoned that the underlying Plaintiff could have been entitled to recover even if the alleged trademark infringement had not

been intentional. In reversing the trial court's holding on this point, the Court of Appeals cited no Michigan law, but instead relied upon two cases from other jurisdictions that were construing a different exclusion ("knowledge of falsity"). In fact, at least some courts that have considered this very issue have held that where the underlying complaint of trademark infringement alleges only intentional wrongdoing, the "with knowledge" exclusion applies to preclude a defense obligation.

Citizens respectfully but strenuously urges this Court to grant leave to appeal for two fundamental reasons. First, the Court of Appeals opinion is clearly erroneous and will cause material injustice. MCR 7.302(B)(5). The opinion contorts the language of the Citizens policy—as well as the allegations of the underlying complaint—beyond recognition, improperly expands the scope of coverage far beyond that which was intended by the parties, and embodies a fundamental misunderstanding of the elements of trade dress infringement in the process. Citizens has been held to owe a duty to defend its insured despite the absence of a covered claim as defined by the language of the parties' agreement, where the only actions the insured is alleged to have engaged in are acts of intentional violations of the underlying plaintiff's rights. Perhaps more importantly, if left intact the opinion would represent a substantial step in a different direction for Michigan law of insurance contract construction—in contravention of a number of contract construction principles repeatedly laid down by this Court. The effect of the Court of Appeals opinion would be bad enough in the specific area of trademark infringement claims, all of which would now be deemed covered as personal and advertising injury under the standard CGL policy form at issue. But the Court of Appeals holding will surely be relied upon by lower courts in Michigan (and elsewhere) in connection with many other types of advertising injury claims. The opinion opens the door for courts, in any advertising injury context, to define the term "advertisement" so broadly as to give it no distinctive meaning at all (notwithstanding

the fact that it is already defined in the policy). Even beyond advertising injury claims, so long as an insured, in any coverage context, can argue that the purpose underlying one type of claim also underlies another distinct type of claim, it can cite the Court of Appeals opinion as support for the proposition that both are covered, regardless of the language of the policy. Finally, regardless of whether an insured has engaged in intentional or accidental wrongdoing, an insurer will be required to defend it as long as the elements of a particular claim do not require intent—irrespective of the fact that the complaint against the insured pleads only intentional wrongdoing.

The second reason this Court should grant leave to appeal is that the issues involve legal principles of major significance to Michigan jurisprudence. MCR 7.302(B)(3). The issue of whether trademark infringement claims are covered as advertising injury under standard liability policies has been the subject of many, many opinions across the country, but has never been addressed by this Court or, until now, in a published Court of Appeals opinion. In a seminal case, *Advance Watch Company v Kemper Nat'l Ins Co*, 99 F3d 795 (CA 6, 1996), the Sixth Circuit, applying Michigan law, held that trademark and trade dress infringement claims are not covered under the “Misappropriation of advertising ideas or style of doing business” in the “course of advertising” definition of advertising injury found in the ISO’s 1986 CGL form. Although Citizens believes that decision and its progeny are correct, there is a clear split of authority on the issue, and, in fact, two circuit court opinions in Michigan have rejected *Advance Watch* as an inaccurate application of Michigan law.<sup>1</sup>

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<sup>1</sup> The pervasiveness of this issue on the litigation landscape is evidenced by the fact that these circuit court opinions are available on Westlaw (*Home-Owners Ins Co v Thomas Lowe Ventures, Inc*, 1998 WL 1856221 at \*2 (Mich Cir Ct, 1998); and *American States Ins. Co. v. Hayes Specialties, Inc*, 1998 WL 1740968 at \*3 (Mich Cir Ct, 1998)), and have themselves been cited by courts in other jurisdictions as purported expressions of Michigan law. See e.g., *Hyman v Nationwide Mut Fire Ins Co*, 304 F3d 1179, 1190 (CA 11, 2002); and *Cincinnati Ins Companies v Pestco, Inc*, 374 F Supp 2d 451, 458 (WD Pa, 2004).

This case is particularly well-suited for establishing the law in this area because both definitions are at issue. Citizens issued two policies with different language, both of which must be addressed in order to determine that Citizens does not owe coverage. In addition to the primary CGL policy, which the Court of Appeals addressed, Citizens issued an excess/umbrella policy that utilizes the definition of “advertising injury” that was at issue in *Advance Watch* (which is different than the “Infringing upon . . . trade dress . . .” language of the Citizens primary policy, which utilizes the language of the ISO’s newer 1998 CGL form). The excess policy requires Citizens to defend if the primary policy does not apply, and Citizens’ insured has sought a defense under both policies, citing both definitions. The Court of Appeals did not address the excess policy because it found that Citizens was required to defend under the primary policy.

Citizens asks this Court to grant leave to review the Court of Appeals opinion with respect to both its interpretation of the coverage provisions of the Citizens primary policy and its application of the “with knowledge” exclusion. Citizens asks further that the Court grant leave to consider whether the trademark infringement allegations in the underlying complaint trigger a defense obligation under the Citizens excess/umbrella policy, thereby resolving the question whether trademark infringement claims trigger coverage as advertising injury in Michigan under both of the standard general liability policy forms generally employed in the industry.

## **STATEMENT OF THE QUESTIONS PRESENTED**

### **I.**

Did the Court of Appeals err in holding that the allegations of trademark infringement in the underlying complaint represent a covered “Personal and advertising injury” claim defined as “[i]nfringing upon another’s . . . trade dress . . . in your ‘advertisement,’” when (A) the underlying complaint does not allege or purport to allege a claim of trade dress infringement; (B) the only alleged activity, for purposes of determining whether there was an “advertisement,” consisted of affixing Flowserve’s trademark to the insured’s products to identify them and shipping the insured’s products in a box with the Flowserve label; and (C) the finding of a causal connection between the supposed “Personal and advertising injury” and Flowserve’s injury was based on nothing more than the trademark infringement itself?

Citizens answers “yes.”

Pro-Seal would answer “no.”

The Court of Appeals would answer “no.”

The trial court did not answer, concluding that if coverage existed in the first instance, it was excluded by the “with knowledge” exclusion addressed in Question II.

### **II.**

Did the Court of Appeals err in reversing the trial court’s ruling that the exclusion for personal and advertising injury “Caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict ‘personal and advertising injury’” precludes coverage, where the underlying complaint alleges only intentional acts on the part of Citizens’ insured?

Citizens answers “yes.”

Pro-Seal would answer “no.”

The Court of Appeals would answer “no.”

The trial court would answer “yes.”

### III.

Do the allegations of trademark infringement in the underlying complaint trigger a defense obligation as allegations of “Advertising injury” under the “Misappropriation of advertising ideas or style of doing business” “in the course of advertising” definition in the Citizens excess/umbrella policy?

Citizens answers “no.”

Pro-Seal would answer “yes.”

The Court of Appeals did not answer this question, having found coverage under the primary policy.

The trial court did not answer this question, concluding that if coverage existed in the first instance, it was excluded by the “with knowledge” exclusion addressed in Question II.



## **STATEMENT OF FACTS**

### **A. Nature of the action**

This is an insurance coverage dispute. Citizens issued a commercial general liability policy (“Citizens CGL policy”) and an excess/umbrella policy (“Citizens excess policy”) to Pro-Seal for the applicable policy period. Both policies include provisions requiring Citizens to defend Pro-Seal in a suit seeking damages to which their respective insurance applies. Pro-Seal was sued by Flowserve Corporation and Flowserve Management (hereinafter collectively referred to as “Flowserve”) in Federal Court in Alaska, Case No. A 03-0242 CI/JWS (hereinafter “Underlying Complaint” or “Flowserve Complaint”). Pro-Seal requested that Citizens defend it in the underlying action pursuant to both Citizens policies. Citizens did not believe the policies afforded coverage based on the allegations of the Flowserve Complaint, and instituted this declaratory action.

### **B. The underlying complaint**

The Flowserve complaint, filed herewith as Exhibit B, is 32 pages in length, and contains 61 numbered paragraphs, many of which have subparagraphs. It begins by identifying the nature of the relief sought, namely damages and injunctive relief (Underlying Complaint, pp 1-2). It then briefly identifies the parties followed by a recitation of facts purporting to establish jurisdiction and venue.

In a section entitled “background,” Flowserve describes the nature of its business and Pro-Seal’s business. Flowserve manufactures, sells and refurbishes mechanical seals. It has three divisions, which supply “engineered pumps,” “precision mechanical seals,” automated and manual control valves, and “actuators.” Flowserve has operated in Alaska under the “Flowserve” trademark since 1997. Flowserve Management is the owner of the BW/IP

trademark, which was first used by its predecessor-in-interest on or about February 25, 1988. It has used the “P-50” trademark to identify one of its mechanical seals since 1992. Pro-Seal is alleged to be a Michigan corporation in the business of selling and repairing mechanical seals.

The Flowserve Complaint contains the following counts:

- I. False representations in violation of Lanham Act, Section 43(a)(1)(A);
- II. Unfair competition under Alaska law;
- III. Trademark infringement in violation of Lanham Act, Section 32(1);
- IV. Trademark counterfeiting in violation of Lanham Act, Section 32(1);
- V. Trademark infringement under Alaska law;
- VI. Trade secret misappropriation under Alaska law; and
- VII. Application for Preliminary and Permanent Injunction

(Exhibit B).

The paragraphs of the underlying complaint to which Pro-Seal points as allegedly triggering a defense obligation are ¶¶ 19-25, 40, and 41 (Pro-Seal’s brief on appeal in the Court of Appeals, pp 6, 21, 24, 30, 33). Paragraph 19 alleges that individual codefendants in the underlying action who are alleged to have been employees of Pro-Seal (Short and Quincy) misrepresented to the public their association with and representation of Flowserve. Paragraph 19 also alleges that the underlying defendants manufactured and sold inferior imitations of Flowserve’s products, and counterfeited Flowserve’s products and services by representing them to be Flowserve products and services.

Paragraph 20 alleges that the underlying defendants improperly appropriated and used Flowserve’s “P-50” trademark to identify their inferior seal. Paragraph 21 alleges that the underlying defendants improperly used other Flowserve trademarks. Paragraph 22, which contains subparagraphs, purports to give examples of the violations set forth in prior paragraphs, and also to show that these actions resulted in customer confusion.

Paragraph 23 alleges that the underlying defendants misrepresented themselves to be authorized distributors or sales representatives of Flowserve products, causing customer confusion and enabling the underlying defendants to take business from Flowserve. Paragraph 24 alleges that the underlying defendants misrepresented their repair/refurbishment service to be “Flowserve certified” in an attempt to trade on the goodwill associated with Flowserve’s certified repair services. Paragraph 25 alleges that the unlawful acts identified in prior paragraphs constituted a fraud on the public and caused customer confusion, which in turn caused Flowserve to lose business.

Paragraphs 40 and 41 are part of count III (“Trademark Infringement in Violation of Lanham Act Section 32(1)),” and allege that the underlying defendants infringed Flowserve’s federally registered trademarks.

Elsewhere, the underlying complaint alleges that the underlying defendants “intentionally copied Flowserve’s ‘P-50’ mark in an effort to trade on the goodwill Flowserve has built in the mark.” (Exhibit B, ¶51.) “Willful infringement” is alleged. (Exhibit B, ¶52.) It is further claimed that, “on information and belief, Defendants’ actions have been willful and malicious thereby warranting exemplary damages in this case.” (Exhibit B, ¶55).

### **C. The Citizens policies**

For the applicable policy periods, Citizens issued a CGL policy, No. 01-MPC-0009677-08, which names Pro-Seal Service Group, Inc. and ProSeal, Inc. d/b/a as named insureds. (Citizens CGL policy filed herewith as Exhibit C). “Coverage B,” of the CGL policy, addressing Personal and Advertising Injury Liability, provides that Citizens will pay those sums that the insured becomes legally obligated to pay as damages because of “personal and advertising injury” to which the insurance applies, and will defend any suit seeking those damages. (Exhibit C). The damages must be “caused by an offense arising out of your business” during the policy

period. (Exhibit C). The CGL policy also states, “However, we will have no duty to defend the insured against any ‘suit’ seeking damages for ‘personal and advertising injury’ to which this insurance does not apply.” (*Id.*).

“Personal and advertising injury” is defined to mean

injury, including consequential “bodily injury” arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy or a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services;
- e. Oral or written publication of material that violates a person’s right of privacy;
- f. The use of another’s advertising idea in your “advertisement”; or
- g. Infringing upon another’s copyright, trade dress or slogan in your “advertisement”.

*Id.* The CGL policy defines “Advertisement” as follows:

1. “Advertisement” means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters.

*Id.*

In a section entitled “**Exclusions**,” the CGL policy states in pertinent part, “This insurance does not apply to: **a.** “Personal and advertising injury”:

- (1) Caused by or at the direction of the insured with knowledge that the act would violate the rights of another and would inflict “personal and advertising injury”;
- (2) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;

\* \* \*

(Exhibit C).

Citizens also issued an excess/umbrella policy, which is filed herewith as Exhibit D. The excess policy contains a “Follow form” provision, in which it states that “[t]he definitions, terms, conditions and exclusions of **underlying insurance** in effect at the inception of this policy apply to this coverage unless: A. They conflict with any of the provisions of this policy; or B. There is a provision in this policy for which a similar provision is not contained in **underlying insurance.**”

“Advertising injury” is defined in the excess policy as follows:

**Advertising injury** means injury caused by one or more of the following offenses committed during the policy period in the course of advertising your goods, products or services:

1. Oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services.
2. Oral or written publication of material that violates a person’s right of privacy.
3. Misappropriation of advertising ideas or style of doing business; or
4. Infringement of copyright, title or slogan.

(Exhibit D).

The excess policy also contains an exclusion for “**Bodily injury, property damage, personal injury, or advertising injury** expected or intended from the standpoint of **an insured.**” (Exhibit D).<sup>2</sup>

**D. Pertinent proceedings**

**1. Trial court proceedings**

Citizens filed its complaint for declaratory judgment in the Oakland County Circuit Court on March 17, 2004. In the complaint, which named both Pro-Seal and Flowserve as Defendants, Citizens alleged that coverage was not owed under the Citizens policies, and sought a declaratory judgment that Citizens was not required to defend Pro-Seal in the underlying action. Both Flowserve and Pro-Seal appeared.

Following discovery, Pro-Seal filed a motion for summary disposition, seeking a declaration that Citizens owed coverage under both policies and was required to defend it in the underlying action. Citizens filed a cross-motion for summary disposition, and a supporting brief in which it argued that it was entitled to a declaration that it did not owe coverage, and was not

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<sup>2</sup> The definitions of “Advertising injury” in the Citizens excess policy are taken from the Insurance Services Office’s (ISO) 1986 CGL form. In 1998, the ISO replaced this clause with a more restrictive definition of certain types of advertising injury, presumably in response to court decisions that found that trademark infringement was a covered claim:

ISO’s 1998 CGL deleted the advertising injury offenses of “infringement of title” and “misappropriation of advertising ideas or style of doing business” upon which many courts had to find coverage. The 1998 CGL substituted new, narrower offenses of “infringing upon another’s copyright, trade dress, or slogan in your advertisement,” and “use of another’s advertising idea in your advertisement.”

*New Policies, Less Coverage Insurance coverage for Intellectual Property Claims*, Intellectual Property Law Newsletter, 22 No 3 IPLN 13 (2004). The Citizens CGL policy is the 1998 version, with this narrower definition of the pertinent offense, and is the only policy the Court of Appeals addressed.

required to defend Pro-Seal. Although both Citizens and Pro-Seal focused primarily on the issue whether the underlying complaint alleged advertising injury that was covered under the Citizens policies in the first instance, Citizens also identified in its summary disposition brief several exclusions set forth in the Citizens CGL Policy, including the exclusion for advertising injury “[c]aused by or at the direction of the insured with knowledge that the act would violate the rights of another and would inflict ‘personal and advertising injury.’” (Citizens’ Summary Disposition Brief, p 6).

On December 27, 2004, the trial court, Honorable Edward Sosnick, issued an Opinion and Order re: Plaintiff’s and Defendant’s Motions for Summary Disposition. (12/27/04 Opinion filed as Exhibit E). After setting forth the nature and substance of the allegations in the underlying complaint, the trial court identified several key provisions of the Citizens policies, including the above-quoted exclusion. The court cited applicable insurance principles regarding an insurer’s duty to defend, then opined as follows:

In this case, the insurance contract excludes coverage for advertising injuries knowingly made. Clearly, the intent of the policy is to cover inadvertent trade dress violations but not to cover the kind of intentional misconduct alleged in this case. The underlying case does not allege unintentional trade dress violations. It alleges an intentional course of conduct involving fraud, deceit, and counterfeit parts being sold as genuine. Clearly, this conduct does not fall within the scope of the limited coverage for advertising injury provided by this policy. Coverage is not arguable for this conduct.

(12/27/04 Op, p 3).

Pro-Seal filed a motion for reconsideration, for which Judge Sosnick issued a briefing schedule, presumably in recognition of the fact that the basis of his ruling had not yet been fairly briefed by the parties. The parties briefed the applicability of the exclusion on which Judge Sosnick had relied, in the form of an opening brief from Pro-Seal, a response from Citizens, and a reply from Pro-Seal. Judge Sosnick denied the motion for reconsideration in an order dated

April 21, 2005. In that order, after setting forth the standard for reconsideration, Judge Sosnick concluded:

The Court remains of the opinion that the conduct alleged in the Alaska litigation was clearly excluded from coverage. The personal and advertising injury coverage contained exclusion for acts committed with knowledge that they would violate the rights of others, false publications knowingly made, and failure of goods to conform to advertised quality. The amended complaint repeatedly alleges intentional and malicious acts, such as product counterfeiting and fraudulently misrepresenting Pro-Seal products as being Flowserve products. These types of acts were excluded from coverage. There are no allegations of inadvertent trademark infringement. The plaintiff had no duty to defend claims which were not arguably covered by the insurance contract. Coverage B, sec 1(a) and *Shefman v Auto-Owners Ins. Co.*, 262 Mich App 631 (2004). Summary disposition was properly granted. Reconsideration is denied.

(Order denying motion for reconsideration filed as Exhibit F).

## **2. Proceedings in the Court of Appeals**

Pro-Seal filed a timely appeal from the trial court's ruling denying its motion for reconsideration, and the matter was placed on the Court of Appeals expedited summary disposition docket. Following briefing, the Court of Appeals held oral argument, and subsequently issued its for-publication opinion on November 1, 2005. In that opinion, the court vacated the trial court's grant of summary disposition in favor of Citizens, and remanded for entry of summary disposition in favor of Pro-Seal, finding that Citizens had a duty to defend Pro-Seal pursuant to the Citizens CGL policy. The Court of Appeals did not address the applicability of the Citizens excess policy.

Following a brief discussion of the facts, procedural history, and applicable standard of review, the Court of Appeals opinion begins its analysis on page 3. The Court of Appeals recognized that the only coverage provision in the CGL policy under which Pro-Seal seeks coverage is for "Personal and advertising injury." The only definition of "personal and



advertising injury” raised by Pro-Seal is “[I]nfringing upon another’s . . . trade dress in your ‘advertisement.’” (Ct App Op, p 3).

The Court of Appeals recognized that the underlying complaint specifically alleges “trademark infringement” and “trademark counterfeiting,” “but does not explicitly allege a ‘trade dress’ infringement.” (Ct App Op, p 4). The Court of Appeals nonetheless held that, because the protection of trademarks and trade dress serves the same statutory purpose of preventing deception and unfair competition, “[t]herefore, it is arguable that Flowserve’s explicit allegation of ‘trademark infringement’ is sufficient to encompass a trade dress violation.” (Ct App Op, p 4).

The court went on to find that even if a claim of trade dress infringement is not encompassed by an allegation of trademark infringement, and even though the underlying complaint does not explicitly allege a trade dress infringement claim, the underlying complaint, in substance, did allege a claim of trade dress infringement. Based on Flowserve’s allegations that Pro-Seal manufactured and sold inferior imitations of Flowserve’s trademarked seals, used Flowserve’s trademarks to identify its own seals, counterfeited Flowserve’s seal component products by representing them to be Flowserve’s products, and sent a counterfeit seal to a customer in a crate marked with a Flowserve label, all of which was alleged to have confused and misled customers into believing that Pro-Seal seals were Flowserve seals, the court opined:

We believe that the concept of trade dress is expansive enough to include the aforementioned allegations because the basis for the allegations are deception and unfair competition. Therefore, examining the substance, as opposed to the mere form, of Flowserve’s complaint, we conclude that Flowserve’s complaint did allege infringement of Flowserve’s trade dress, notwithstanding the complaint’s failure to specifically characterize the violation as trade dress infringement.

(Ct App Op, p 5).

The Court of Appeals next analyzed whether the alleged violation of trade dress in the underlying complaint occurred in an “advertisement.” The court held that the allegations in the

Flowserve complaint that Pro-Seal used Flowserve's trademarks *to identify* its products and that Pro-Seal shipped its own seal in a box with the Flowserve label were sufficient to support the conclusion that the supposed allegations of trade dress violations involved trade dress violations in an advertisement. (Ct App Op, pp 5-6). The Court of Appeals went on to find a causal connection between the advertisement and the injury. (Ct App Op, p 6).

Finally, the court reversed the trial court's conclusion that coverage, if any, was precluded by the exclusion for personal and advertising injury caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict personal and advertising injury. Although the Court of Appeals did not disagree that the Flowserve complaint alleges only intentional conduct, and does not allege negligent or inadvertent conduct, the Court of Appeals concluded that "Pro-Seal could have been liable to Flowserve even if its infringement of Flowserve's trademark was inadvertent, negligent, or reckless." (Ct App Op, p 7).

Because it found that coverage as to the underlying complaint existed and was not excluded by the Citizens CGL policy, the Court of Appeals deemed it unnecessary to address whether coverage exists under the Citizens excess policy. Based on its finding of coverage, the Court of Appeals reversed the trial court's order granting summary disposition in favor Citizens, and remanded for entry of summary disposition in favor of Pro-Seal.

## **STANDARD FOR GRANTING LEAVE TO APPEAL**

The standard for granting leave to appeal is set forth in MCR 7.302. That rule provides the following grounds for granting leave to appeal:

(1) the issue involves a substantial question as to the validity of a legislative act;

(2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;

(3) the issue involves legal principles of major significance to the state's jurisprudence;

(4) in an appeal before decision by the Court of Appeals,  
(a) delay in final adjudication is likely to cause substantial harm, or  
(b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan Statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid;

(5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or

(6) in an appeal from the Attorney Discipline Board, the decision is erroneous and will cause material injustice.

The issues presented in this appeal merit this Court's review under ¶ (5) because the Court of Appeals' opinion is clearly erroneous and will cause material injustice, not only in this case but likely in future case in which lower courts rely on the Court of Appeals' opinion, which, unless this Court intervenes, will represent controlling Michigan law. Review is also warranted under ¶ (3), because the issues involve legal principles of major significance to the state's jurisprudence.

## **STANDARD OF REVIEW IN SUBSTANTIVE APPEAL**

This Court reviews a trial court's grant or denial of a motion for summary disposition de novo. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

## ARGUMENT I

### **THE COURT OF APPEALS ERRED IN HOLDING THAT THE ALLEGATIONS OF TRADEMARK INFRINGEMENT IN THE UNDERLYING COMPLAINT REPRESENT A COVERED “PERSONAL AND ADVERTISING INJURY” CLAIM DEFINED AS “INFRINGEMENT UPON ANOTHER’S . . . TRADE DRESS . . . IN YOUR ‘ADVERTISEMENT’”**

This case requires application of the following definition of “personal and advertising injury” in the Citizens CGL Policy: “injury . . . arising out of one or more of the following offenses: . . . Infringing upon another’s copyright, trade dress or slogan in your ‘advertisement’.”<sup>3</sup> Proper application of settled insurance contract construction principles reveals that the Court of Appeals erred in finding that the allegations of the Flowserve complaint trigger coverage under the Citizens CGL policy.

This Court has set forth certain principles of contract interpretation that are to be applied in insurance coverage matters such as the one at bar. A number of such rules that are particularly apt in the instant context were set forth in *Henderson, supra*, where the Court said:

First, an insurance contract must be enforced in accordance with its terms. *Upjohn Co. v. New Hampshire Ins. Co.*, 438 Mich. 197, 207, 476 N.W.2d 392 (1991). A court must not hold an insurance company liable for a risk that it did not assume. *Auto-Owners Ins. Co. v. Churchman*, 440 Mich. 560, 567, 489 N.W.2d 431 (1992). Second, a court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise. *Id.* Thus, the terms of a contract must be enforced as written where there is no ambiguity. *Stine v. Continental Casualty Co.*, 419 Mich. 89, 114, 349 N.W.2d 127 (1984).

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<sup>3</sup> Although the Citizens CGL policy includes other definitions of “Personal and advertising injury,” Pro-Seal did not argue that coverage exists under any of them. Nor does it. Pro-Seal has argued that coverage exists under the “[m]isappropriation of advertising ideas or style of doing business” “in the course of advertising” definition employed in the Citizens excess policy. As set forth in Argument III, however, there is no coverage under that definition, either.

While we construe the contract in favor of the insured if an ambiguity is found<sup>4</sup>, *Auto Club Ins. Ass'n v. DeLaGarza*, 433 Mich. 208, 214, 444 N.W.2d 803 (1989), this does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefitting an insured. *Upjohn Co, supra* at 208, n. 8, 476 N.W.2d 392. The fact that a policy does not define a relevant term does not render the policy ambiguous. *Auto Club Group Ins. Co. v. Marzonie*, 447 Mich. 624, 631, 527 N.W.2d 760 (1994). Rather, reviewing courts must interpret the terms of the contract in accordance with their commonly used meanings. *Group Ins. Co. of Michigan v. Czopek*, 440 Mich. 590, 596, 489 N.W.2d 444 (1992). Indeed, we do not ascribe ambiguity to words simply because dictionary publishers are obliged to define words differently to avoid possible plagiarism. *Upjohn Co, supra* at 209, n. 8, 476 N.W.2d 392.

*Henderson*, 460 Mich at 354-355.

The Court in *Henderson* also taught that, in interpreting plain English phrases, courts are to give contextual meaning to the phrase to determine what the phrase conveys to those familiar with our language and its contemporary usage. *Id.*, at 356. “This approach is consistent with the parallel rule of statutory construction, which requires that all nontechnical words and phrases be defined according to the common and approved usage of the language.” *Id.*, (Citing MCL 8.3a).

Another important (and pertinent) rule of construction recognized by this Court is that “[c]ourts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.” *Klapp, supra*, at 469. See also *Wilkie v Auto Owners Ins Co*, 469 Mich 41, 50, n 11; 664 NW2d 776 (2003).

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<sup>4</sup> In *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 472; 663 NW2d 447 (2003), the Court held that the rule requiring ambiguities to be construed in favor of the insured should only be applied as a last resort, when all other means of interpretation have been applied and found wanting.

This Court last set forth rules governing a liability insurer's duty to defend in *American Bumper and Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450-452; 550 NW2d 475 (1996), where the court stated:

The duty to defend is related to the duty to indemnify in that it arises only with respect to insurance afforded by the policy. If the policy does not apply, there is no duty to defend. *Protective Nat'l Ins. Co. v. City of Woodhaven*, 438 Mich. 154, 159, 476 N.W.2d 374 (1991). However, the scope of the two duties is not identical; the duty to defend is broader than the duty to indemnify. *Detroit Edison Co. v. Michigan Mut. Ins. Co.*, 102 Mich.App. 136, 141-142, 301 N.W.2d 832 (1980). If the allegations of a third party against the policyholder even arguably come within the policy coverage, the insurer must provide a defense. *Polkow v. Citizens Ins. Co.*, 438 Mich. 174, 178, 180, 476 N.W.2d 382 (1991); *Allstate Ins. Co. v. Freeman*, 432 Mich. 656, 662, 443 N.W.2d 734 (1989). This is true even where the claim may be groundless or frivolous. [fn omitted] *Polkow* at 178, 476 N.W.2d 382. This Court has also explained:

"An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. *Dochod v. Central Mutual Ins. Co.*, 81 Mich.App. 63, 264 N.W.2d 122 (1978). The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible. *Shepard Marine Construction Co. v. Maryland Casualty Co.*, 73 Mich.App. 62, 250 N.W.2d 541 (1976). In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor. 14 Couch, Insurance, 2d (rev ed), § 51:45, p 538 [now § 51:49, p 489]." [*Protective Nat'l Ins. Co.*, *supra* at 159, 476 N.W.2d 374, quoting *Detroit Edison Co.*, *supra* at 142, 301 N.W.2d 832.]

*American Bumper*, *supra*, at 450-452.

As this Court has also recognized, "The duty of the insurer to defend the insured depends upon the allegations in the complaint of the third party in his or her action against the insured."

*Protective Nat Ins Co of Omaha v City of Woodhaven*, 438 Mich 154, 159; 476 NW2d 374

(1991) (Citing *Detroit Edison Co v Michigan Mutual Ins Co*, 102 Mich App 136, 141-142, 301 NW2d 832 (1980)). See also *Guerdon Industries, Inc v Fidelity & Cas Co of New York*, 371 Mich 12, 18; 123 NW2d 143 (1963).

Citizens respectfully submits that the Court of Appeals opinion reflects several fundamental errors of contract interpretation, which led the court to hold incorrectly that Citizens is required to defend Pro-Seal based on the allegations of the Flowserve complaint.

**A. The Court of Appeals erred in concluding that the underlying complaint alleged, or should be deemed to have alleged, trade dress infringement**

The Citizens CGL Policy specifically defines personal and advertising injury to include claims of trade dress infringement. Trademark infringement is not included. The Court of Appeals acknowledged that the underlying complaint specifically alleges “trademark infringement,” and does not explicitly allege “trade dress” infringement. (Ct App Op, p 4). The court nevertheless held that the underlying complaint triggers coverage under the trade dress infringement clause, based on the conclusion that (1) the protection of trademarks and trade dress serves the same statutory purpose of preventing deception and unfair competition, and, therefore, trademark infringement necessarily *encompasses* a trade dress violation; and (2) the underlying complaint actually did allege infringement of Flowserve’s trade dress notwithstanding the complaint’s failure to say as much. (Ct App Op, pp 4-5).

The court’s first rationale, respectfully, is simply wrong. Trademark infringement and trade dress infringement are distinct claims, with different elements. The fact that the protection of both trademarks and trade dress serves the same statutory purpose of preventing deception and unfair competition does not alter this reality. The Citizens CGL policy does not purport to provide coverage for any and all claims that have, as their underlying purpose, the prevention of deception and unfair competition. The notion that because one type of claim, the purpose of



which is preventing deception and unfair competition, is covered all such claims are covered finds no support in Michigan law of contract interpretation.

Not surprisingly, the Court of Appeals' conclusion in this regard was not accompanied by citation to any authority from any jurisdiction. Indeed, courts that have considered this very issue have found, correctly, that coverage of trade dress infringement does *not* constitute coverage of trademark infringement claims. For example, in *Central Mut Ins Co v StunFence, Inc.*, 292 F Supp 2d 1072 (ND Ill, 2003), the insured, like Pro-Seal, argued that allegations of trademark infringement triggered coverage under the definition "Infringing upon another's copyright, trade dress or slogan in your 'advertisement.'" StunFence argued that this language covered all trademark claims because the same legal analysis is used to resolve both trademark and trade dress infringement claims. The court soundly rejected this argument, reasoning as follows:

Frankly, that contention makes no sense. While the term "trademark" is sometimes employed "in a broad and generic sense to denote the entire field of trademarks, service marks, trade names, and trade dress" (*Platinum Home Mortgage Corp v Platinum Fin Group, Inc.*, 149 F3d 722, 726 n 1 (7th Cir 1998)), the term "trade dress" alone denotes only a subset of trademark law. StunFence's premise amounts to urging instead that the lesser ("trade dress") includes the greater (trademark infringement generally)--a neat trick, but at war with normal usage. Just because courts apply essentially the same type of legal analysis to the two concepts in no way implies that the parties to the Primary Policy intended to treat the concepts as identical in scope.

In fact, StunFence's argument runs exactly opposite to the familiar canon *expressio unius est exclusio alterius*. Furthermore, it ignores the fact that in 1998 the Insurance Services Office ("ISO"), the organization that accepts responsibility for drafting the Primary Policy, changed the definition of "advertising injury" from "[i]nfringement of copyright, title or slogan" to "[i]nfringing upon another's copyright, trade dress or slogan in your 'advertisement' " (5 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* ["McCarthy"] § 33:5, at 33-10 to 33-11 (4<sup>th</sup> ed.2003)). While the historical evolution of the "advertising injury" section of the Primary Policy is certainly not entitled to conclusive weight in

interpreting the policy provision (see *Rhone-Poulenc Inc v Int'l Ins Co*, 71 F3d 1299, 1304 (7th Cir.1995)), it is clearly significant that the ISO made the change from “title” to “trade dress” and not “trademark” after there was a clear trend in most courts to recognize that the term “title” included trademark infringement claims (5 McCarthy § 33:9).<sup>5</sup>

*Id.*, at 1077 (citations omitted).

The same conclusion was reached independently in *NGK Metals Corp v Nat Union Fire Ins Co*, 2005 WL 1115925 (ED Tenn, April 29, 2005) (Exhibit G). The underlying complaint in that case alleged trademark infringement on the part of NGK based on its use of Cleveland’s trademark on NGK’s golf club heads. The court rejected NGK’s argument that coverage existed under the “[i]nfringement of . . . trade dress . . .” definition of personal and advertising injury, reasoning:

Based on this definition, the Court finds that the facts of the underlying action do not potentially constitute an injury arising from NGK's infringement of Cleveland's trade dress. The underlying complaint does not refer to the total look of Cleveland's product; there is no reference to the packaging, the design or the shape of the golf club head or the golf club; and there is no reference to the total image or overall impression of Cleveland's golf club head or golf club. Instead, Cleveland's complaint specifically alleges trademark infringement and refers only to NGK's use of Cleveland's trademark on the golf club heads. Consequently, the underlying action does not even potentially involve a claim for infringement of Cleveland's trade dress.

*Id.*, at \*12 (Exhibit G). See also *Ohio Cas Ins Co v Albers Medical, Inc*, 2005 WL 2319820 (WD Mo, September 22, 2005) (Exhibit H) (holding that trademarks are not copyrights, trade dress, or

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<sup>5</sup> The Sixth Circuit has held that trademark infringement does not trigger a defense obligation under the offense defined as “infringement of copyright, title, or slogan.” *ShoLodge, Inc v Travelers Indem Co of Illinois*, 168 F3d 256 (CA 6, 1999). Although the court was applying Tennessee law, it specifically noted that Tennessee law was not materially distinguishable from Michigan law (which was applied in *Advance Watch, supra*). Pro-Seal does not argue that this  
(Continued on next page.)

slogans, and, thus, a trademark infringement claim is not covered under this definition of advertising injury).

As all of these decisions have recognized, allegations of trademark infringement do not, by definition, include allegations of trade dress infringement, contrary to the Court of Appeals' conclusion. These decisions are correct, and their reasoning applies with equal force in the instant case.

The Court of Appeals' conclusion that the underlying complaint did, in fact, allege trade dress infringement is equally erroneous, if not more so. With all due respect to the Court of Appeals, allegations that Pro-Seal used Flowserve's trademark to identify its seals, and sent a counterfeit seal to a customer in a crate marked with a Flowserve label are *not* allegations of trade dress infringement. They were not called trade dress infringement in the Flowserve complaint, and, respectfully, the Court of Appeals' conclusion that these allegations are, in substance, allegations of a trade dress violation reflects a misunderstanding of the elements of a trade dress infringement claim.

To prove trade dress infringement, a Plaintiff must establish: (1) that the trade dress in question is distinctive in the marketplace, thereby indicating the source of the good it dresses, (2) that the trade dress is primarily nonfunctional, and (3) that the trade dress of the competing good is confusingly similar. *Abercrombie & Fitch Stores, Inc v American Eagle Outfitters, Inc*, 280 F3d 619, 629 (CA 6, 2002) (citing *Wal-Mart Stores, Inc v Samara Bros, Inc*, 529 US 205, 210, 120 S Ct 1339, 146 L Ed 2d 182 (2000)).

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(Continued from previous page.)

definition, which is included in the Citizens excess policy, was triggered by the allegations of the Flowserve complaint.

Flowserve's allegations that Pro-Seal used Flowserve's trademarks to identify its own seals and counterfeited Flowserve seal component products by representing them to be Flowserve's products are not allegations of a trade dress violation. (Ct App Op, pp 4-5). Nor is the allegation that Pro-Seal sent a counterfeit seal to a customer in a crate marked with a Flowserve label. (*Id*, p 5). There is no suggestion in the underlying complaint that the crate marked with a Flowserve label constituted Flowserve's trade dress that was distinctive in the marketplace, or that it constituted trade dress that is primarily nonfunctional. In fact, it is clear from the allegation itself that the crate *was* functional; Flowserve itself refers to the crate as a "shipping crate."<sup>6</sup> Indeed, setting aside the fact that there is no explicit allegation of trade dress infringement in the underlying complaint, there is no allegation of a Flowserve trade dress that is distinctive in the marketplace, thereby indicating the source of the good it dresses, or of a trade dress that is primarily nonfunctional.

The reasoning of the courts in both *StunFence, supra*, and *NGK, supra*, applies on this point as well. In both cases, the insured's trademark infringement consisted of affixing the underlying plaintiff's trademark to the insured's products, and passing them off as the insured's, thereby deceiving and confusing potential customers. Yet the court in each case found that such allegations, while allegations of trademark infringement, did not allege trade dress infringement. The Court of Appeals ruling to the contrary, which appears to be the only such ruling in the country, should be reversed.

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<sup>6</sup> The actual allegation in the underlying complaint in this regard is found in paragraph 22(e), in which Flowserve alleges in pertinent part: "In furtherance of their fraud, Defendants had shipped the counterfeit BXBW-4500 seals to the customer in a shipping crate prominently labeled with the Flowserve® trademark label." (Exhibit B, p 14).

**B. The Court of Appeals erred in finding that there was an “advertisement” as that term is defined in the Citizens policy**

The Court of Appeals correctly recognized that the Citizens policy defines “advertisement” as “a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supports.” (Ct App Op, p 5). Notwithstanding this specific definition, the Court of Appeals went on to cite *Poof Toy Products, Inc v United States Fidelity & Guaranty Co*, 891 F Supp 1228, 1235-1236 (ED Mich, 1995), wherein the district court reasoned that allegations of trademark and trade dress infringement inherently involve advertising activity. The Court of Appeals then reasoned that because Pro-Seal’s alleged act of using Flowserve’s trademarks to identify its products, both on the products themselves and on a shipping crate, would have caused customer confusion, therefore these actions constitute an advertisement. (Ct App Op, pp 5-6). In so holding, the Court of Appeals essentially adopted the reasoning of *Poof Toy* that all trademark and trade dress infringement inherently involves advertisement. There are several reasons why the Court of Appeals’ conclusion is incorrect and should be reversed by this Court.

First, the notion that all trademark or trade dress infringement inherently involves advertising activity would read the requirement that there be advertising activity completely out of the policy. Whether policy language requires a violation to be in an “advertisement” or done in the “course of advertising,” for those terms to have any meaning whatsoever in the context of trademark or trade dress infringement, they must mean something more than simply trademark or trade dress infringement. This is one of the points that was made by the Sixth Circuit in *Advance Watch, supra*. In that case, which involved the application of Michigan law, the Sixth Circuit rejected the insured’s argument that the appearance or display of the product in that case (writing instruments) was in itself advertising. As the Sixth Circuit explained, “[this argument] proves

too much, for it would invoke advertising injury coverage and the duty to defend whenever a product is merely exhibited or displayed. We conclude as a matter of law that the ‘committed in the course of advertising’ policy language requires more, and that [the insurer] was entitled to summary judgment on this ground.”<sup>7</sup> In so holding, the Sixth Circuit rejected the reasoning in *Poof Toy* that all trademark and trade dress infringement inherently involves advertising activity.

Second, the Court of Appeals’ reliance on *Poof Toy* is misplaced in view of the fact that *Poof Toy* did not involve a definition of “advertisement” specifically set forth in the policy. The *Poof Toy* court was purporting to determine whether the “course of advertising” requirement was met, which was not defined in the insurance policy at issue. By contrast, the Citizens policy does define the word “advertisement,” and specifically requires that the alleged violation occur “in an ‘advertisement.’”

At least one court has recognized that, as applied to the newer CGL policy with this specific definition of “advertisement,” the *Poof Toy* analysis is unavailing. In *Westfield Cos v OKL CAN Line*, 155 Ohio App 3d 747, 755; 804 NE2d 45 (Ohio App 1 Dist 2003) the court noted that the *Poof Toy* reasoning that all trademark and trade dress infringement necessarily involves advertising “does not resolve this case because ‘advertisement’ was specifically defined in the *Westfield* policy.” *Id.* After setting forth the relevant definition of “advertisement,” which is identical to the definition in the Citizens policy, the court continued, “This definition was broad, but it required more than just stating that the infringer’s use of another’s trade dress was likely to cause confusion to the consumer or to deceive the consumer as to the origin or manufacturer of the goods. Also required was a ‘notice’ intended to attract customers.” *Id.*

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<sup>7</sup> As demonstrated in the above quote, *Advanced Watch* (and *Poof Toy*) involved a claim that trade dress infringement was covered under the “misappropriation of advertising ideas or style of doing business” definition of advertising injury.

Similarly here, even if the Court were to agree with *Poof Toy* (and disagree with *Advance Watch*) that all trade dress infringement is necessarily advertisement in the abstract, this does not address the point that there must be an “advertisement” as defined in the Citizens policy.

While the Court of Appeals did attempt to deal with the definition of “advertisement” in the Citizens policy, error is revealed by that attempt. The Court of Appeals simply declared, “Both using Flowserve’s trademarks on its own products and shipping a Pro-Seal seal in a box with a Flowserve label are *acts constituting notice* that is published to the specific market segment in which Pro Seal and Flowserve compete about the seals for the purpose of attracting customers or supporters.” (emphasis added) (Ct App Op, p 6). First, neither using Flowserve’s trademarks nor shipping a Pro-Seal seal in a box with a Flowserve label is an act constituting notice that is published . . . about seals for the purpose of attracting customers or supporters. Second, even if these were “acts constituting” such notice, the definition of “advertisement” requires “a notice,” which, given its plain, ordinary meaning, clearly requires some type of written or audio announcement. This is especially apparent when the phrase “a notice” is immediately followed by the phrase “that is broadcast or published.” Acts constituting notice cannot fairly be deemed to satisfy the definition of “a notice that is published” under even the most tortured definition of that phrase, much less under the common meaning that must be ascribed to it. *Henderson, supra*. It should also be noted that if “acts constituting notice” were sufficient to satisfy the requirement of “a notice” in the Citizens policy, it is difficult to imagine a

circumstance under which that requirement would have any meaning. All acts that are known to someone other than the actor are technically notice of something.<sup>8</sup>

Similarly, the mere use of Flowserve's trademark on Pro-Seal's products and on a box in which they were shipped does not satisfy the "broadcast or published" requirement as those words are commonly understood. This also is especially apparent when the phrase "a notice that is broadcast or published" is considered as a whole.

This Court's teaching in *Henderson, supra*, is particularly apt as applied to the phrase "a notice that is broadcast or published" in the context of the trademark infringement alleged in Flowserve's complaint. Considering that phrase as a whole, and ascribing to it its commonly understood meaning, the mere use of trademarks to identify Pro-Seal's products simply does not constitute "a notice that is broadcast or published." Like its conclusion that trademark infringement allegations are also allegations of trade dress infringement, the Court of Appeals' conclusion that the definition of "advertisement" was satisfied runs directly afoul of this Court's teaching that "the plain meaning of a word or phrase should [not] be perverted, [and] a word or phrase, the meaning of which is specific and well recognized, should [not] be given some alien construction merely for the purpose of benefitting an insured." *Henderson, supra*, at 355.

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<sup>8</sup> Even Pro-Seal did not argue that "acts constituting notice" could satisfy the requirement of "a notice." Pro-Seal argued in its brief on appeal that Pro-Seal "applied its name to the packaging that contained the products at issue and labeled those products so that they would be associated with Pro-Seal. Flowserve claimed that these products were placed in commerce and constituted a trademark/trade dress infringement . . ." (Pro-Seal's Brief, p 20). As Citizens argued in the Court of Appeals, mere application of a product name to a product in the form of a label, and placement of that product in commerce does not meet the definition of advertisement set forth in the policy. It does not constitute "a notice . . . about [Pro-Seal's] goods, products or services . . ." Such activity also does not satisfy the "broadcast or published to the general public or specific market segment" prong of the definition. Merely to place a product in commerce is not to "broadcast" or "publish" anything to the general public or even to a specific market segment. Finally, this activity is not done for the "purpose of attracting" anyone.



The Court of Appeals also noted that Flowserve’s complaint “suggests that Pro-Seal’s alleged trade dress violations were committed during the course of advertising because Flowserve sought an injunction preventing Pro-Seal from using its trademark ‘to market, advertise, or identify’ its product.” (Ct App Op, p 5). The Citizens policy only requires Citizens to pay sums that the insured becomes legally obligated to pay as damages because of “personal and advertising injury,” and to defend the insured against any suit seeking those damages. The fact that Flowserve sought to enjoin Pro-Seal from using its trademark in advertising does *not*, contrary to the Court of Appeals’ observation, suggest that Flowserve sought damages because of advertising—particularly in light of the fact that Flowserve did not state anywhere in its 32-page complaint that Pro-Seal had used a Flowserve trademark in an advertisement. See also *Advance Watch, supra*, at 806-807 (the fact that the underlying plaintiff seeks to enjoin the advertisement of infringing products does not mean advertisement of infringing products caused injury or provoked the claim).

In fact, if anything, the request for this injunctive relief reinforces that Flowserve did not seek damages for trademark infringement in advertising; the complaint repeatedly alleges that Pro-Seal used Flowserve’s trademarks “to identify” Pro-Seal products, but never alleges that it used those trademarks to “advertise” its products. And Flowserve obviously understood that those two terms represent distinct actions, as demonstrated by the fact that it did seek an injunction against using its trademarks to advertise or identify its products.

Because the Flowserve complaint does not allege an “advertisement” as that term is defined in the Citizens CGL policy, the Court of Appeals opinion should be reversed, or, at a minimum, reviewed by this Court.<sup>9</sup>

**C. There is no causal connection between an advertisement and an advertising injury**

Having concluded that the mere act of trademark infringement, in the form of affixing Flowserve’s labels on its products and on a shipping crate in order to identify those products, constitutes an advertisement, it was but a small step for the Court of Appeals to conclude that Flowserve alleged “personal and advertising injury” caused by a covered offense. What is

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<sup>9</sup> Although Pro-Seal has not argued that coverage exists under the “use of another’s advertising idea in your ‘advertisement’” definition in the Citizens CGL policy, the lack of an “advertisement” is fatal to a claim of coverage under that definition as well. Notably, the court in *StunFence, supra*, after finding that allegations of trademark infringement do not invoke coverage as allegations of trade dress infringement, did find that the “use of another’s advertising idea” definition triggered a defense obligation on the part of the insurer. Significantly, however, that finding was based on the fact that the insured in that case had used the underlying plaintiff’s trademarks in its advertising. As the court explained, “StunFence used Gallagher’s trademark ‘Power Fence’ on its website and made promotional claims identical to those used by Gallagher in marketing its own product. Additionally, Gallagher claimed that StunFence made statements in trade industry periodicals that StunFence owned and developed the technology and maintained proprietary rights over that technology . . . and of course Gallagher asserted that it suffered harm as a result of StunFence’s advertising.” 292 F Supp 2d at 1079-1080. Significantly, the court also specifically concluded that the mere attachment of trademark infringing signs on its product along with attempts to pass off those products as its own did *not* constitute an advertisement. As the court explained:

“[T]he closest that Gallagher came to alleging that StunFence infringed upon the overall appearance of Gallagher products was its assertion that StunFence put Power Fence signs on StunFence products and tried to pass off its fences as though they were Gallagher’s. But StunFence makes no effort to explain how those allegations have any connection with an ‘advertisement’ as that term is used in the Primary Policy.”

*Id.* at 1078.

significant about this finding is that it reveals that the Court of Appeals' unduly broad definition of "advertisement" effectively nullifies the policy's requirement of a causal connection.

The Citizens policy states that the insurance "applies to 'personal and advertising injury' caused by an offense arising out of your business . . . ." It defines "personal and advertising injury" to mean, in pertinent part, injury arising out of the following offense: "Infringing upon another's copyright, trade dress or slogan in your 'advertisement.'" Courts that have analyzed claims of advertising injury coverage have universally recognized the requirement that there be a causal connection between the offense and the underlying plaintiff's injury. See, e.g. *GAF Sales & Service, Inc v Hastings Mutual Ins Co*, 224 Mich App 259, 262; 568 NW2d 165 (1997); *Advanced Watch, supra*. Even assuming arguendo that trademark infringement claims constitute claims of trade dress infringement, thus triggering the subject definition, a proper application of the Citizens policy would also require analysis of whether the underlying plaintiff's alleged injury was caused by the trademark infringement itself or by the fact that the trademark infringement was in an "advertisement."

An example of such an analysis is found in *Advanced Watch, supra*. In that case, the underlying plaintiff alleged that the insured committed trade dress infringement by manufacturing a pen that was deceptively similar in design to the underlying plaintiff's pen. It was also alleged that the pen was depicted in an advertisement. The court held, inter alia, that the underlying plaintiff's injury was caused by the trade dress infringement itself, not by the advertisement in which the trade dress infringement was depicted. The absence of a causal

connection was one of several reasons given by the Sixth Circuit for granting summary judgment in favor of the insurer.<sup>10</sup>

*Farmington Casualty Co v Cyberlogic Technologies, Inc*, 996 F Supp 695 (ED Mich, 1998) is another example. Wonderware sued Cyberlogic and Intellution, alleging that the FIX driver was substantially identical to, and therefore infringed upon, the InTouch driver. *Id.* Cyberlogic sought coverage from its insurer, Farmington, which refused to defend. *Id.* at 698. Much like Pro-Seal here, Cyberlogic argued that the infringing item – sample software provided on a compact disc – was both the infringing product and advertising. *Id.* at 703. The court rejected this argument. The *Cyberlogic* court found that the advertising allegations in the complaint were not the basis for the suit. Relying upon *Advance Watch, supra*, the court ruled “When the claim for infringement exists irrespective of the advertising activities, the claim for defense must fail. . . . The advertising activities must cause the [infringement] -- not merely expose it.” *Id.* at 704-05 (brackets in original).

In the instant case, because the Court of Appeals has held that the mere *use* of a trademark to identify a product constitutes an advertisement, a causal connection will always be found to exist between an advertisement (or a “course of advertising”) and trademark or trade dress infringement. If the causal connection requirement is to have any meaning in the context of trade dress infringement, the term “advertisement” must mean something other than mere trade dress infringement. The requirement of a causal connection is now meaningless in the context of trademark or trade dress infringement in the wake of the Court of Appeals opinion.

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<sup>10</sup> It should also be noted that to the extent other courts have disagreed with *Advance Watch* (while others have expressed agreement with it), the disagreement has been directed at the interpretation of the misappropriation definition, not at the court’s clearly correct conclusion regarding the causal connection requirement.

It should also be noted that the causal connection requirement that the Court of Appeals has effectively nullified tends to be the requirement that is most frequently found lacking in the context of advertising injury claims. In addition to *Advance Watch, supra*, and *Cyberlogic, supra*, discussed above, this was also a fatal flaw in claims of coverage in *Shefman v Auto-Owners Ins Co*, 262 Mich App 631; 687 NW2d 300 (2004) (finding lack of causal connection between advertising injury and advertising where alleged injury from misappropriated building designs was not caused by advertising); and *GAF Sales, supra* (copyright infringement caused injury, not advertising). See also *Skylink Technologies, Inc v Assurance Co of America*, 400 F3d 982 (CA 7, 2005) (holding that injury from insured using underlying plaintiff's name was caused not by insured's advertising, but by the failure of insured's products to perform as advertised); and *Microtech v Nationwide*, 40 F3d 968, 971 (CA 9, 1994) (if the policyholder does some wrongful act and then advertises it, harm caused by the wrongful act alone is not within the scope of the term advertising injury).

## ARGUMENT II

### **THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S RULING THAT THE EXCLUSION FOR PERSONAL AND ADVERTISING INJURY "CAUSED BY OR AT THE DIRECTION OF THE INSURED WITH THE KNOWLEDGE THAT THE ACT WOULD VIOLATE THE RIGHTS OF ANOTHER AND WOULD INFLICT 'PERSONAL AND ADVERTISING INJURY'" PRECLUDES COVERAGE, WHERE THE UNDERLYING COMPLAINT ALLEGES ONLY INTENTIONAL ACTS ON THE PART OF CITIZENS' INSURED**

An insurer's duty to defend depends on the allegations of the underlying complaint. *Protective Nat'l Ins. Co.*, *supra* at 159. If the underlying complaint does not allege a theory of recovery that is covered by the policy, an insurer does not owe a defense. *Id.* And, as the Court of Appeals has correctly held, an insurer is not required to defend against claims for damages that are expressly excluded from policy coverage. *Meridian Mut Ins Co v Hunt*, 168 Mich App 672, 677; 425 NW2d 111 (1988).

The trial court in this case correctly held that the underlying complaint did not allege a covered claim because, even assuming there was coverage under the personal and advertising injury coverage provisions, the underlying plaintiff's allegations triggered the exclusion for "personal and advertising injury" . . . "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury.'"

Flowserve's complaint presents allegations that fall within this exclusion, and does not assert any allegations that would not fall within the exclusion even if coverage otherwise existed. The only paragraphs of the underlying complaint to which Pro-Seal has pointed are paragraphs 19-25, 40 and 41. To the extent Flowserve alleges "personal and advertising injury" that would otherwise fall within the coverage provisions, it alleges without equivocation advertising injury

that was caused with the knowledge that Pro-Seal's acts would violate Flowserve's rights and would inflict personal and advertising injury.

The Court of Appeals did not disagree that the Flowserve complaint alleged only intentional wrongdoing; it did not allege inadvertent or negligent wrongdoing of any kind. Nevertheless, the Court of Appeals reasoned that "Flowserve's allegations of intentional and willful conduct on the part of Pro-Seal . . . , which may have been designed merely to enhance damages, should not trigger the with 'knowledge' exclusion when Pro-Seal could have been found liable for a trademark violation even if the infringement was not knowing." (Ct App Op, p 8). Citizens respectfully submits that the Court of Appeals' finding in this regard represents an improper application of the rules for determining whether an insurer owes a duty to defend. Because an insurer's duty to defend is based solely on the allegations of the underlying complaint, where those allegations fall within the reach of a policy exclusion, and where there are no allegations made that do not fall within the reach of the exclusion (if they trigger coverage to begin with), the insurer does not owe a duty to defend.

While it is true that an insurer has a duty to defend despite theories of liability asserted against an insured which are not covered under the policy so long as the underlying complaint asserts a theory that is covered under the policy, this requires that the underlying complaint, in fact, assert a theory that is covered under the policy. Here, Flowserve's complaint does not assert a theory that does not fall within the exclusion (assuming *arguendo* trademark infringement claims are covered as personal and advertising injury), because the underlying complaint simply does not contain any allegations of inadvertent or negligent action the part of Pro-Seal. The fact that Flowserve did not have to establish knowledge on the part of Pro-Seal in order to establish a trademark violation does not alter this point—because it has nothing to do with the allegations that are actually made against Citizens' insured. In order to trigger a defense obligation under

the Citizens policy, it was necessary for the Flowserve complaint to assert at least one theory that would not fall within the “with knowledge” exclusion. Flowserve did not allege any such theory.<sup>11</sup>

A number of courts that have addressed this very issue have correctly recognized that, where the underlying complaint alleges only intentional advertising injury, the “with knowledge” exclusion precludes a defense obligation. In *Dairy Source, Inc v Biery Cheese Co*, 674 NW2d 680, 2003 WL 22964724 (Wis App) (unpublished, filed as Exhibit I), Dairy Source sought damages for trademark infringement when Biery Cheese allegedly manufactured and sold cheese products bearing Dairy Source’s protected labels and trademark jar lids. Dairy Source alleged that Biery Cheese did so knowingly, in violation of Dairy Source’s rights. The court held that there was simply no way to read the allegations of the underlying complaint in a way that did not trigger the “with knowledge” exclusion. The court persuasively reasoned:

We will assume without deciding that an intent to violate the rights of the plaintiff or to injure the plaintiff is not a necessary element of the claims Biery Cheese contends constitutes advertising injuries. Even if we do so, we are not persuaded by Biery Cheese’s

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<sup>11</sup> Nor is this result affected by the principle that an insurer must look “behind the allegations” to determine whether a duty to defend is owed. *American Bumper*, citing *Shepard Marine Construction Co v Marilyn Cas Co*, 73 Mich App 62; 250 NW2d 541 (1976). Whereas the insurer must look “behind the allegations” to determine whether a duty to defend is owed, the purpose for doing so is merely to discern what activity or claim the underlying Plaintiffs are asserting, irrespective of the “skill in pleading” or the “technicality of pleading.” *Shepard Marine, supra*. This rule does not mean that the insurer must assume that the underlying allegations, in substance, are not really being asserted, or that the underlying Plaintiffs intended to allege something altogether different (e.g., negligence or inadvertence, as opposed to intentional misconduct). If that were the case, no insurer could ever properly deny a defense. As the Court of Appeals has put it: “Inasmuch as the insurer must look beyond the precise wording of the allegations in a third party’s complaint against its insured to determine whether coverage is possible, so must the allegations be examined to determine the substance, as opposed to the mere form of the complaint.” *Illinois Employers Ins Co v Dragovich*, 139 Mich App 502, 507; 362 NW2d 767 (1984). Applying this rule here, the substance of the allegations in the underlying complaint (as well as the form) is a clear, unambiguous assertion of intentional wrongdoing on the part of Pro-Seal.



argument that the elements of the claims control rather than the specific conduct alleged in the complaint.

*Id.*, ¶ 17.

A similar result was also reached in *Atlas Fencing v Hartford Insurance Co*, 2004 WL 1925892 (Conn Sup) (unpublished, filed as Exhibit J). In that case, Atlas Fencing was sued for copyright infringement, and sought a defense from its insurer, Hartford. Despite recognizing that copyright infringement was covered under the coverage provisions of the Hartford policy, the court nonetheless held that Hartford did not owe a duty to defend Atlas because an “expectation of infliction” exclusion was triggered by the allegations of the underlying complaint. Atlas Fencing argued that the underlying complaint alleged not only willful but also non-willful copyright infringement. (*Id.*, p\* 7). The court rejected this argument, stating, “While it is true that intent or willfulness is not a required element of copyright infringement under the copyright statute, . . . the complaint in the federal case has alleged only volitional acts committed by Atlas Fencing for this cause of action. *Id.* Although the underlying plaintiff *could have* pled a copyright infringement claim by asserting unintentional acts of copyright infringement, because it did not do so, but, instead, asserted only volitional acts on the part of the insured, the court correctly held that the exclusion for intentional misconduct precluded a defense obligation. See also *Educational Training Systems, Inc v Monroe Guarantee Ins Co*, 129 SW3d 850 (Ct App Kent 2004) (no duty to defend where it is clear that the claims of trademark infringement asserted against the insured are based on intentional misconduct); and *Baumann v Elliott*, 703 NW2d 383, 2005 WL 1574041 (Wis App) (unpublished, filed as Exhibit K) (no defense obligation on the part of the insurer for allegations of conduct otherwise covered as personal and advertising injury where the underlying complaint clearly alleged intent, triggering the “with knowledge” exclusion).

In the instant case, the Court of Appeals stated that it was “persuaded” by *Bay Electric Supply, Inc v The Travelers Lloyds, Ins Co*, 61 F Supp2d 611, 619 (SD Tex, 1999), and *Union Ins Co v The Knife Co*, 897 F Supp 1213, 1217 (WD Ark, 1995). In neither of these cases, however, did the court identify the allegations in the underlying complaint. Without knowing the allegations in those complaints, it is impossible for this Court or the Court of Appeals to give them any weight. In addition, both of these cases were addressing the “knowledge of falsity” exclusion only; neither purported to interpret or apply an exclusion akin to the “with knowledge” exclusion in this case. In fact, as stressed in *The Knife Co, supra*, the difficulty with the knowledge of falsity exclusion as applied to a trademark case is that the word “falsity” is arguably ambiguous. Infringement of an underlying plaintiff’s trademark is not necessarily “false” even if it is wrongful and in violation of the Lanham Act. The court in *The Knife Co* specifically distinguished the knowledge of falsity exclusion from an intentional acts exclusion.

Because the allegations of the underlying complaint, whether viewed on their face or for the substance “behind” those allegations, clearly assert intentional, knowing trademark violations, and clearly do not assert inadvertent or unintentional trademark violations, the “with knowledge” exclusion precludes a defense obligation even if coverage otherwise exists. The Court of Appeals’ reversal of the trial court’s sound ruling in this regard should be reversed, or, at a minimum, reviewed by this Court.

### ARGUMENT III

#### **THE ALLEGATIONS OF TRADEMARK INFRINGEMENT IN THE UNDERLYING COMPLAINT DO NOT TRIGGER A DEFENSE OBLIGATION AS ALLEGATIONS OF “ADVERTISING INJURY” UNDER THE “MISAPPROPRIATION OF ADVERTISING IDEAS OR STYLE OF DOING BUSINESS” “IN THE COURSE OF ADVERTISING” DEFINITION IN THE CITIZENS EXCESS POLICY**

Having found potential coverage under the Citizens CGL Policy, the Michigan Court of Appeals declined to consider whether coverage is afforded by the Citizens excess policy. Because that issue must be resolved if the Court finds that coverage does not exist under the Citizens CGL policy, and because that issue, along with the issues on which the Court of Appeals ruled, involve legal principles of major significance to Michigan jurisprudence, this Court should consider it, and hold that the claims of trademark infringement do not trigger coverage as “misappropriation of advertising ideas or style of doing business” “in the course of advertising.”<sup>12</sup>

The Court of Appeals has identified an appropriate three-pronged test for determining whether an underlying complaint alleges a covered advertising injury as defined in general liability policies with the “course of advertising” language:

The policy coverage for ‘advertising injury’ thus requires three elements: an advertising injury as defined in the policy; a ‘course of advertising’ (not defined in the policy); and proof of a causal relationship between the first two elements.

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<sup>12</sup> The definition of “Advertising injury” in the Citizens excess policy also includes the offense “Infringement of copyright, title or slogan.” As noted above in fn 5, Pro-Seal did not argue that that definition is met by Flowserve’s allegations. As also noted, the Sixth Circuit has held that allegations of trademark infringement do not trigger a defense obligation under this offense. *ShoLodge, supra*.

*GAF Sales, supra*, at 262. See also *Shefman, supra*, at 638 (2004).<sup>13</sup> An insurer does not owe a defense or indemnity obligation unless all three elements are met. In the instant case, Pro-Seal, which bears the burden of proving coverage under the Citizens policies, *Heniser v Frankenmuth Mut Ins*, 449 Mich 155, 161, n 6; 534 NW2d 502 (1995), cannot establish any of these elements, much less all three.

**A. The underlying complaint does not allege “[m]isappropriation of advertising ideas or style of doing business”**

Although there has been no published decision from this Court or the Court of Appeals on this issue, the cases that have applied Michigan law to the question have correctly found that claims of trademark infringement such as those at bar do not trigger coverage under the “misappropriation of advertising ideas” definition.

The Sixth Circuit, in *Advance Watch, supra*, specifically so held. In that case, Advance entered into a license agreement with Pierre Cardin that permitted it to use the “Pierre Cardin” trademark. *Id.* at 798. Cross subsequently sued Advance alleging that the Pierre Cardin writing instruments advertised and sold by Advance infringed Cross trademarks, as well as its trade dress. *Id.* Cross brought claims for statutory and common-law trademark infringement, trade dress infringement, unfair competition, and dilution. *Id.* Advance sought coverage of the claims under its general liability policy with Travelers.

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<sup>13</sup> As noted in Argument I, the Citizens CGL Policy requires that the injury occur “in your advertisement,” as opposed to “in the course of advertising.” As also noted, this amendment to the language of the standard CGL policy form is more restrictive; rather than simply being part of a course of advertising, the injury-causing agent must actually be in an advertisement. Ultimately this is a distinction without a difference as applied to the allegations of the underlying complaint in this case, since there was neither an advertisement nor a course of advertising in connection with the alleged injury.

The *Advance Watch* court correctly recognized that Michigan law requires courts to construe terms according to their commonly understood meanings, and should refrain from applying a technical or strained construction. *Id.*, at 803 (citations omitted). The court determined that none of the terms “misappropriation,” “advertising ideas,” or “style of doing business” is ambiguous, citing a Wisconsin case that had reached the same conclusion. *Id.*, at 802 (Citing *Atlantic Mut Ins Co v Badger Medical Supply Co*, 191 Wis2d 229; 528 NW2d 486 (Wis Ct App 1995)). The court recognized that each of these terms has either an established dictionary meaning or a meaning derived from case law. Misappropriation in particular, observed the court, “has existed as a definite tort (at least in the context of unfair competition) since the decision in *International News Service v Associated Press*, 248 US 215, 39 S Ct 68, 63 L Ed 211 (1918).” *Id.* at 802. Consequently, reasoned the court, there exists “a body of law which gives meaning to the term ‘[m]isappropriation of advertising ideas or style of doing business,’ and which renders the term unambiguous, as referring to a category of actionable conduct separate from trademark and trade dress infringement.” *Id.*

The court also observed that this conclusion was supported by the absence of any express reference to trademark infringement. Construing the phrase “misappropriation of advertising ideas or of style of doing business,” in the context of a claim of trademark infringement, the court reasoned as follows:

A layperson might at first glance read the term so broadly as to include in its scope trademark and trade dress infringement and a good deal of other conduct of the general nature of taking something which belongs to another. Such a reading, however, would expand the meaning of the term to the extent of not having any distinctive meaning at all, and would lead to the absurd result of providing coverage for liability for trademark infringement without any mention of the word “trademark.”

*Id.*, at 803.

Although a number of decisions have declined to follow *Advance Watch* on the issue of whether “[m]isappropriation of advertising ideas or style of doing business” includes trademark infringement, Citizens respectfully submits that that case is well-reasoned and rightly decided. The Sixth Circuit went to great lengths to analyze the relevant policy language and allegations, and also examined the reasoning of cases that had previously ruled in a contrary manner. Of perhaps equal importance, no appellate court from any jurisdiction applying Michigan law has determined that that decision represents an incorrect application of Michigan insurance contract, construction principles. In addition, at least one other federal appellate court has agreed with *Advance Watch* that allegations of trademark infringement do not trigger coverage under the relevant policy language, finding *Advance Watch* to be persuasive: *Callas Enterprises, Inc v Travelers Indem Co of America*, 193 F3d 952 (CA 8, 1999).

The Michigan Court of Appeals has also held, albeit in an unpublished opinion, that an underlying complaint for trademark infringement that was strikingly similar to the Flowserve complaint did not trigger a defense obligation on the part of an insurer pursuant to the “misappropriation of advertising ideas or style of doing business” definition of advertising injury. In *Varilease Technology Group, Inc v Michigan Mut Ins Co*, 2004 WL 2913661 (Mich App) (filed as Exhibit L), the underlying complaint alleged that the insured falsely represented the origin of the underlying plaintiff’s diagnostics software and materials as being the insured’s original works. The underlying complaint also alleged that the insured falsely represented to customers of the underlying plaintiff that the insured was licensed by the underlying plaintiff to copy and use the underlying plaintiff’s software and materials. The Court of Appeals found it unnecessary to hold that trademark or trade dress infringement claims as a category involve “misappropriation of advertising ideas or style of doing business,” but nonetheless held:

Here the issue is . . . whether the specific allegations in the Unisys complaint allege ‘misappropriation of

advertising ideas or style of doing business.’ We conclude that they allege neither. The Unisys complaint does not implicate any Unisys ‘advertising ideas.’ Moreover, the allegations that plaintiffs falsely represented that they were licensed or permitted by Unisys to use its diagnostics software and support materials do not implicate Unisys’ style of doing business. Thus, the trial court erred in concluding that the allegations of trademark infringement involved ‘misappropriation of advertising ideas or style of doing business.’ Accordingly, a duty to defend was not triggered and defendant was entitled to summary disposition.

(*Id.*, p 6)

Whereas *Varilease* is unpublished, its reasoning is unassailable. Flowserve’s allegations against Pro-Seal, which bear a strong resemblance to the allegations in *Varilease*, do not implicate any of Flowserve’s “advertising ideas,” and do not implicate Flowserve’s style of doing business.

Under the rationale of either *Advance Watch* and its progeny or *Varilease*, the allegations made in the Flowserve complaint do not constitute allegations of misappropriation of advertising ideas or style of doing business as that phrase is properly understood.

**B. The underlying complaint does not allege a “course of advertising” or a causal connection thereto.**

Even if the trademark infringement allegations in the underlying complaint were held to satisfy the “[m]isappropriation of advertising ideas or style of doing business,” coverage under the Citizens excess policy is lacking because the trademark infringement was not alleged to have occurred in a “course of advertising.” *GAF, supra*, at 261, 263. Nor can Pro-Seal establish a causal connection between Flowserve’s alleged injury and a “course of advertising.”

The arguments that the Flowserve complaint does not allege an “advertisement” (Argument I B.) and that it does not allege a causal connection between Flowserve’s alleged

injury and an advertisement (Argument I C.) also apply to the requirements of a “course of advertising” and a causal connection in the Citizens excess policy, and will not be repeated here. While it is true that the phrase “course of advertising” is not defined, this merely means that courts must interpret the phrase in accordance with its commonly used meaning. *Henderson, supra*, at 355 (Citing *Group Ins Co of Michigan v Czopek*, 440 Mich 590, 596, 489 NW2d 444 (1992)). Also, the phrase must not be construed in a way that renders it nugatory. *Klapp, supra*, at 469.

The common, ordinary meaning of “course of advertising” simply does not include allegations of affixing a trademark infringing label on a product to identify it. Also, as with the requirement of an “advertisement” in the Citizens CGL policy, if the requirement of a “course of advertising” is to have any distinctive meaning at all, that is, if it is not to be rendered nugatory, it must mean something more other than the mere trademark infringement itself.

Pro-Seal’s argument in the Court of Appeals betrays that rendering the “course of advertising” requirement nugatory is precisely what it wants (and needs, in order to prevail). Pro-Seal argued that an injury caused by alleged trademark or trade dress infringement “cannot help but occur in and be related to advertising.” (Pro-Seal’s Brief on Appeal, p 23). Because this position is akin to expanding the meaning of “course of advertising” “to the extent of not having any distinctive meaning at all” *Advance Watch, supra*, at 803, Citizens respectfully submits it is incorrect.

This Court should, instead, give meaning to the phrase “course of advertising”—its common ordinary meaning—and find that the mere allegations of trademark infringement in the Flowserve complaint do not allege a course of advertising.

The requirement of a causal connection between “advertising injury” and a “course of advertising” is similar to the requirement in the pertinent definition of “Personal and advertising



injury” in the Citizens CGL policy that the violation occur *in* an advertisement. As courts have repeatedly held, this requirement of a causal connection, in the context of trademark infringement, means that the underlying plaintiff’s injury must be caused not by the infringement itself, but by the advertising of the infringement. Some of these cases are discussed in Argument I C. above, and that discussion will not be repeated. *Varilease, supra*, is also instructive on this point. The insured in that case was sued for, *inter alia*, copyright infringement. The Court of Appeals assumed *arguendo* that copyright infringement was a covered claim, but noted that the causal connection prong could not be established because the underling complaint did “not allege that copyright infringement was committed in the course of plaintiffs’ advertising.” *Id.*, p 4.

Because Pro-Seal cannot establish a causal connection between the alleged trademark infringement and a course of advertising, it is not entitled to coverage under the Citizens excess policy for this reason as well.

**RELIEF**

For the reasons set forth above, Citizens requests that this Court either (1) peremptorily reverse the Court of Appeals' November 1, 2005, Opinion, and reinstate the trial court's order granting summary disposition in favor of Citizens; or (2) grant leave to appeal the Court of Appeals opinion and review the issues presented herein. Citizens further requests any and all other relief to which it is entitled.

Respectfully submitted,

PLUNKETT & COONEY, P.C.

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DATED: December 13, 2005

STATE OF MICHIGAN  
IN THE SUPREME COURT

CITIZENS INSURANCE COMPANY,

Plaintiff/Appellant,

S.C. No. \_\_\_\_\_

v

COA No. 262759

PRO-SEAL SERVICE GROUP, INC.,  
d/b/a PRO-SEAL, INC., a Michigan  
corporation,

L.C. No. 04-056953-CZ

Defendant/Appellee.

and

FLOWERVE CORPORATION, a New York corporation,  
FLOWERVE MANAGEMENT COMPANY, a  
Delaware corporation, SETH SHORT and  
RANDY QUINCY,

Defendants,

and

PROSEAL SERVICE GROUP, INC.,  
d/b/a PRO-SEAL, INC., a Michigan  
corporation,

Counter-Plaintiff,

v

CITIZENS INSURANCE COMPANY,

Counter-Defendant.

\_\_\_\_\_ /

**AFFIDAVIT OF COUNSEL**

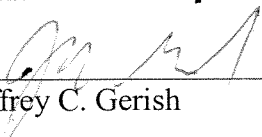
STATE OF MICHIGAN )  
 )ss  
COUNTY OF OAKLAND )

Jeffrey C. Gerish, being first duly sworn, deposes and says:

1. That he is an attorney with the firm of Plunkett & Cooney, P.C., and is in principal charge of the above-captioned cause for purposes of preparing the instant application for leave to appeal;

2. That the contents of the attached application are true and accurate to the best of deponent's present information and knowledge.

FURTHER DEPONENT SAITH NAUGHT.

  
\_\_\_\_\_  
Jeffrey C. Gerish

Subscribed and sworn to before me  
this 13th day of December, 2005

  
\_\_\_\_\_  
Notary Public, Oakland County, MI

My Commission Expires: 2/7/09

RODIN LARSON  
NOTARY PUBLIC OAKLAND CO., MI  
MY COMMISSION EXPIRES Feb 7, 2009

STATE OF MICHIGAN  
IN THE SUPREME COURT

CITIZENS INSURANCE COMPANY,

Plaintiff/Appellant,

S.C. No. \_\_\_\_\_

v

COA No. 262759

PRO-SEAL SERVICE GROUP, INC.,  
d/b/a PRO-SEAL, INC., a Michigan  
corporation,

L.C. No. 04-056953-CZ

Defendant/Appellee.

and

FLOWERVE CORPORATION, a New York corporation,  
FLOWERVE MANAGEMENT COMPANY, a  
Delaware corporation, SETH SHORT and  
RANDY QUINCY,

Defendants,

and

PROSEAL SERVICE GROUP, INC.,  
d/b/a PRO-SEAL, INC., a Michigan  
corporation,

Counter-Plaintiff,

v

CITIZENS INSURANCE COMPANY,

Counter-Defendant.

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**EXHIBITS TO CITIZENS' APPLICATION FOR LEAVE TO APPEAL**

## TABLE OF EXHIBITS

- A. Court of Appeals November 1, 2005, Opinion.
- B. Flowserve Complaint against Citizens' insured.
- C. Citizens CGL Policy.
- D. Citizens Umbrella/Excess Policy.
- E. Trial Court's Opinion Granting Summary Disposition in favor of Citizens.
- F. Trial Court's Opinion Denying Pro-Seal's Motion for Reconsideration.
- G. *NGK Metals Corp v Nat Union Fire Ins Co*, 2005 WL 1115925  
(ED Tenn, April 29, 2005)
- H. *Ohio Cas Ins Co v Albers Medical, Inc*, 2005 WL 2319820  
(WD Mo, September 22, 2005)
- I. *Dairy Source, Inc v Biery Cheese Co*, 674 NW2d 680, 2003  
WL 22964724 (Wis App)
- J. *Atlas Fencing v Hartford Insurance Co*, 2004 WL 1925892 (Conn Sup)
- K. *Baumann v Elliott*, 703 NW2d 383, 2005 WL 1574041 (Wis App)
- L. *Varilease Technology Group, Inc v Michigan Mut Ins Co*, 2004  
WL 2913661 (Mich App)